

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-7093

To be argued by
FREDERIC BLOCK

United States Court of Appeals
FOR THE SECOND CIRCUIT

GLADYS GENTILE,

Plaintiff-Appellant,

against

JOHN WALLIN, ET AL.,

Defendants-Appellees.

ON APPEAL FROM JUDGMENT AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff moved in the District Court for the Eastern District of New York for a preliminary injunction to restore her to her teaching position in the Comsewogue School District, asserting in her complaint that she had been discharged from her employment in a manner which deprived her of her liberty and property interests under the Fourteenth Amendment.

Based upon her alleged federal causes of action, together with certain non-federal tort causes of action, the plaintiff, in her complaint, in addition to reinstatement, sought monetary damages against all of the defendants for two million dollars, asking the Court to take pendent jurisdiction over the state causes of action and predicated federal jurisdiction, and the right to declaratory, injunctive and monetary relief thereunder, on 42 USC §§ 1981, 1983, 1985, and its jurisdictional statute, 28 USC § 1343 (3)(4); and upon the Fourteenth Amendment itself via 28 USC § 1331(a).

More specifically, the plaintiff's complaint sought permanent reinstatement to her teaching position with full back pay and benefits *nunc pro tunc* to June 30, 1975, the date of her effective discharge, a declaration that she is a tenured teacher and that her constitutional rights had been violated, and compensatory damages in the sum of one million dollars due to the harm allegedly occasioned by the defendants to her reputation, their interference with her right to pursue her chosen profession and certain contract rights, and libel, slander and mental distress allegedly effected upon her by the defendants; as well as punitive damages in the additional sum of one million dol-

lars by reason of the defendants' alleged willful and malicious behavior.

Plaintiff sought to obtain this relief from four sets of defendants (see Complaint, ¶¶ 6-9 [43-45]):¹ (1) the Board of Education in its corporate capacity; (2) Wallen and Hines in their official capacities as principal administrators, and also in their individual capacities; (3) the members of the Board of Education in 1975, at the time of the plaintiff's discharge (D'Addario, Flescher, Howard Sapienza, Weinerman, Allen and Dreyer), who were sued in both their official and individual capacities; and (4) the members of the Board of Education in 1970 who allegedly failed to take action with respect to the plaintiff's request at that time for an adoption leave (Sills, Porter, Busa, Panullo, Ahkao, Stropoli and Martin), also sued in both their official and individual capacities.

By cross-motion the defendants moved to dismiss the complaint in its entirety (255-257), asserting that the variegated claims therein either failed to measure up to legally cognizable claims or, alternatively, should be dismissed by way of summary judgment. Defendants' motion set forth the following specific grounds (256):

(1) The District Court was without subject matter jurisdiction to entertain any claims for damages against the Board of Education or any of the individual defendants in their official capacities;

(2) The complaint did not state a claim for damages against the individual defendants in their individual capacities, or, in the alternative, could not withstand the defendants' motion for summary judgment;

(3) The plaintiff was not deprived of a property interest in her employment and consequently was not entitled to a due process hearing;

¹ Numerical references are to pages of Appendix on Appeal.

(4) The plaintiff did not have an actionable liberty interest claim; and

(5) The invocation of § 3031 of the New York State Education Law, commonly known as "The Fair Dismissal Law," satisfied due process standards for a probationary teacher asserting a deprivation of a liberty interest.

By decision-order dated December 22, 1976, the District Court (Pratt, J.) dismissed the entire complaint, granting summary judgment to the defendants in respect to each of the plaintiff's federal claims and, consequently, declining to retain pendent jurisdiction over the state claims. (Decision of Pratt, J., 445-459.)

In so doing, Judge Pratt decided that the uncontroverted facts failed to establish that any of the defendants violated any of the plaintiff's constitutional rights, holding that the termination of plaintiff's employment was not accompanied by any deprivation of constitutionally protected liberty or property interests, and that, in any event, she was afforded due process protection.

Accordingly, since no constitutional claims survived, the District Court did not have to reach the issues raised in the first two branches of the defendants' motion, namely (1) whether that Court is possessed with subject matter jurisdiction to entertain damage claims against the Board of Education or any of the individual defendants in their official capacities, and (2) whether the complaint stated a claim for damages against the individual defendants in their individual capacities or could withstand the defendants' motion for summary judgment.

Both these issues were fully briefed below.² The defendants, relying in large measure upon this Circuit's recent decision in *Monell v. Department of Social Services*, 532

² See Defendants' Memorandum of Law in the District Court, pp. 16-17, 24-37.

F.2d 259 (2d Cir. 1976), contended that the District Court was without subject matter jurisdiction to entertain any damage claims against either the Board of Education or any of the other defendants, in their official capacities, notwithstanding that the claims were brought both under the Civil Rights Act, pursuant to 42 USC § 1981, et seq., and for violation of a constitutional right under 28 USC § 1331 (a). As for the defendants' liability in their individual capacities, the defendants argued that they were entitled to immunity by reason of the application of the qualified immunity standards recently expressed by the Supreme Court in *Wood v. Strickland*, 420 U.S. 308 (1975).

These issues would resume their vitality should the Court disagree with Judge Pratt's determination, and hence are raised and briefed as alternative issues on this appeal. (See Points IV and V, *infra*.)

Statement of Facts

Pursuant to Rule 9(g) of the lower court's rules, the defendants annexed to their notice of motion a statement of the material facts as to which they contended there was no genuine issue to be tried (258-264). The statement also was repeated in the defendants' memorandum of law before the District Court.³ The facts set forth therein are fully supported by the record as uncontroverted and, indeed, the plaintiff, as was her right under Rule 9(g), failed to take issue with them, thereby admitting, by operation of the rule, to their genuineness.⁴ Accordingly, this statement of material facts is set forth again herein since it represents

³ See defendants' memorandum below, pp. 18-24.

⁴ Rule 9(g) of the Rules of the United States District Court for the Eastern District of New York provides that if the party opposing summary judgment fails to controvert the moving party's statement of the material facts, such as in the present case, "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed admitted."

the uncontroverted facts which the parties have agreed present no triable issues.

Gladys Gentile was initially employed by the School District in 1962 as a kindergarten teacher and was granted tenure as such in 1965. She resigned for personal reasons in 1967 and was re-employed in 1968. In 1970 she requested a leave of absence so that she could care for a baby which she intended to adopt. At that time the District did not have a policy covering this type of leave, and therefore her request was not granted.

The plaintiff was hired once again in 1972 as a probationary second grade teacher. She accepted this status and comported herself as a probationary teacher during the ensuing years, submitting herself to observations and evaluations, required by the collective bargaining agreement of only probationers, and never protesting her appointment or status as a non-tenured teacher.

On March 21, 1975, the District Principal, Wallen, summoned the plaintiff to his office for a private conversation, at which time Wallen confronted the plaintiff with a number of teacher evaluation forms indicating that observations and evaluations were made of the plaintiff by her building principal, Johnson, on days when either Johnson or the plaintiff were absent or when school was not in session. Plaintiff admitted that she signed these forms. Wallen advised the plaintiff that her prospective tenure appointment was in jeopardy.

The private conversation between Wallen and the plaintiff continued on March 24, 1975, at which time Wallen privately informed the plaintiff that he could not recommend her for tenure.

By letter dated April 1, 1975, Wallen formally advised the plaintiff that he would not recommend her for tenure, in purported compliance with Article IV(B) of the collective bargaining agreement between the School District and the Teachers Association.

By letter dated April 7, 1975, the plaintiff demanded of Wallen the reasons for his refusal to recommend her for tenure. In compliance with this request, Wallen set forth his reasons by letter to the plaintiff dated April 10, 1975, annexed to Complaint as Exhibit III.

On April 14, 1975, Wallen preferred six charges against Johnson stemming from his falsification of teacher evaluation forms, including those involving the plaintiff. (Exhibit IV attached to Complaint.) On May 12, 1975, an additional charge of a comparable nature was preferred by Wallen against Johnson. (Exhibit IV attached to Complaint.)

Pursuant to the provisions of § 3020-a of the Education Law of the State of New York, Johnson requested a tenure hearing before a three-member panel, and further requested, as was his legal right, that the hearing be held in public. The hearing transpired on June 12, June 23 and July 9, 1975, at which time testimony and evidence was adduced by the School District in support of the charges.

On September 12, 1975, the panel rendered its decision, finding Johnson culpable on five of the seven charges and recommending his dismissal as building principal. On November 20, 1975, the Board of Education rendered its written determination, as required by law, wherein it confirmed the findings and recommendation of the statutory panel.

On April 14, 1975, the plaintiff, through her Teachers Association, initiated a grievance under the collective bargaining agreement contending that the plaintiff should be adjudged to have received tenure by default by reason of the alleged failure of the District Principal to give her written notice of her dismissal within the time period set forth in Article IV(B) of the agreement.

This litigation, commenced in behalf of the plaintiff, resulted in a decision, on August 29, 1975, by the Supreme

Court of the State of New York, holding that Article IV(B) was void and that the plaintiff could not thereby acquire tenure by default.⁵

On May 15, 1975, the plaintiff and her representatives, at their behest, met with the District Superintendent, Hines, at his office, at which time she was given a full opportunity to be heard in respect to the District Principal's recommendations that she be denied tenure. At this hearing evidence and statements in her support were presented by the plaintiff and her representatives to Hines. As of that time, Hines had not yet made his determination as to whether he would recommend the plaintiff for tenure. Section 3013, as it then existed, required the District Superintendent to make his recommendation at least sixty (60) days prior to the termination of the probationary period.

On June 2, 1975, in compliance with the requirements of § 3013 of the Education Law, the District Superintendent, Hines, wrote to the plaintiff that he was not recommending her for tenure, stating no reasons therein for this decision.

Pursuant to the rights accorded to her under § 3031 of the Education Law, the plaintiff, by letter dated June 4, 1975, demanded of Hines that he furnish her with the specific reasons for his action.

Acknowledging that he was obliged to honor the plaintiff's demand by reason of the requirements imposed upon him under § 3031 of the Education Law, Hines responded to the plaintiff by letter dated June 11, 1975 (Exhibit V annexed to Complaint). In turn, plaintiff submitted a detailed, 18-page response on June 26, 1975, fully explaining and defending her position.

This response was thereafter filed with the School District Clerk and considered by the Board of Education in

⁵ Subsequent to the District Court's decision herein, this determination was affirmed by the Appellate Division (see *supra*, p. 22).

private at its executive session on July 21, 1975, after which, as required by law, the Board acted on Hines' recommendation, voting to accept it.

In sworn testimony given on October 1, 1975, the plaintiff asserted that she considered herself aggrieved and to have been libeled, slandered and defamed by reason of the letters which she received from Wallen and Hines, the testimony given at the judicial proceedings mandated by law against Johnson, and certain statements made to the Unemployment Insurance agency, which, however, did not cause her to lose any unemployment benefits.

At no time did she assert therein that the School District or Wallen had caused her circumstances to be published in any newspapers or that any disclosure of the reasons for her failure to obtain tenure was effected by any of the defendants when they voted to accept the District Superintendent's recommendation on July 21, 1975. Affidavits submitted in support of the subject motions by members of the Board of Education who served during the months of April, June and July of 1975, set forth that the Board was acting under directions of counsel not to disclose any of the plaintiff's circumstances to the public.

An affidavit submitted in support of the subject motions by the District Principal set forth that the plaintiff's personnel file is considered confidential, and that the file or the reasons given to the plaintiff in response to her demands have not and will not be disclosed to any prospective employer or to anyone else other than the plaintiff or her authorized representatives.

After numerous articles appeared in the newspaper about her discharge, the plaintiff received overwhelming community support and sympathy, as evidenced by a petition signed by more than 700 members of the community requesting her reinstatement, and presented to the Board on July 21, 1975, when the Board accepted Hines' recommendation, and as further evidenced by the fact that many people spoke in support of the plaintiff on that occasion.

POINT I

**The Plaintiff Does Not Have An Actionable
Liberty Interest Claim.**

The current day touchstone to any evaluation of an actionable "liberty interest" claim is, of course, *Board of Regents v. Roth*, 408 U.S. 564 (1972), where the Supreme Court set forth the two-standard test of (1) whether the non-renewal of a person's employment occurs under such circumstances as "might seriously damage [plaintiff's] standing and associations in his community", or (2) whether such non-renewal and related circumstances imposed on the discharged employee a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

More recently, the *liberty* issue has achieved a substantial degree of sophistication by virtue of the current Supreme Court decisions in *Paul v. Davis*, 424 U.S. 693 (1976), *Bishop v. Wood*, — U.S. —, 96 S.Ct. 2074 (1976) and *Codd v. Velger*, — U.S. —, 97 S.Ct. 882 (1977), reversing *sub nom. Velger v. Cawley*, 525 F.2d 334 (2d Cir. 1975).

In *Paul*, the plaintiff was most assuredly stigmatized by virtue of the publication and posting of his name amongst those accused of shoplifting activities. Yet this misfortune, certainly far more reprehensible than that which the plaintiff complains of in the present case, was held not actionable under the due process clause, the Court stating that it has never held that "reputation alone, apart from some more tangible interests, such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." (424 U.S. at 701.) Thus, since the plaintiff did not lose his job as a result of the stigma, no due process rights were violated.

Consistent with *Paul* is this Circuit's language in *Velger v. Cawley*, *supra*, 525 F.2d 334, 336 (1975), where Justice

Clark, in commenting on *Roth and Perry v. Sindermann*, wrote:

These cases teach that when either a deprivation of a property interest such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, *result from the decision to discharge*, due process requires that notice of the charges and a hearing must be granted to the dischargee. (Emphasis supplied.)

Apart from any other consideration, the plaintiff in the present case was not stigmatized as a result of her discharge, but rather, if at all, by the disclosure of the reasons for her discharge *required by her demands*. Until then, all that the public could have known, from whatever source, was that yet another probationary teacher was not being granted tenure.

Wallen and Hines were required under the Fair Dismissal Law (Education Law § 3031) to faithfully and candidly disclose the reasons for the plaintiff's dismissal if she so requested. *Rathbone v. Board of Education of Hamilton Central School District*, 47 A.D.2d 172 (3d Dept. 1975), appeal dismissed 36 N.Y.2d 916 (1975).

It was within the plaintiff's power, therefore, to initiate the claimed stigma to her reputation and liberty interests. She chose to exercise that power.

It is becoming more and more apparent that it is the *dissemination* of stigmatizing information by the public employer *at its behest*, at the time of or just prior to the employee's loss of employment, that gives rise to the employee's right to a "due process hearing."

Surely, when a public employer has a virtual unfettered right to discharge a probationary employee without the benefit of reasons or hearing, the fact that an employee

has the right to demand written reasons for dismissal, as is now the case in New York under the Fair Dismissal Law, most assuredly places the employer in the dubious position of having to make a unilateral pre-judgment as to whether or not the employee is entitled to a dismissal hearing by virtue of the demand. The employee's demand for the reasons for discharge thereby becomes tantamount to a demand for a hearing.

It is unseemly to suggest that by the exercise of the rights afforded a probationer under § 3031 a probationary teacher can effectuate the same rights to a hearing afforded to a discharged tenured employee. Justice Clark recognized the general problem when he suggested, as a remedy in *Velger*, that an employer could guard against conducting hearings for probationers if "[t]he appellees could change their disclosure procedures to prevent the dissemination of derogatory and possibly stigmatizing allegations. . . ." (525 F. 2d at 334)⁶

This paradox has now captured the attention of a number of courts. Thus, in *Weathers v. West Yama County School District*, 387 F.Supp. 552, 559 (D. Col. 1974), aff'd 530 F.2d 1335 (10th Cir. 1976), the Court stated:

To say that plaintiff may show the requisite damage to his reputation by himself "publishing" this material is simply bootstrapping. Moreover, this suit is not a part of the "circumstances" to be considered in applying the principles of *Roth*.

⁶ As set forth in the uncontroverted Statement of Material Facts, the School District has indeed established disclosure procedures designed to protect the confidentiality of all teachers employed by the School District, including the plaintiff, "and that the file or the reasons given to the plaintiff in respect to her demands have not and will not be disclosed to any prospective employer or to anyone other than the plaintiff or her authorized representative." (Statement of Material Facts 263-264; see also affidavit of Wallen 277-278.)

Similarly, the Seventh Circuit cogently observed in *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975) that:

Plaintiff's argument that he had to disclose the reasons to quell the rumors which were circulating does not establish that his reputation was injured by board action. Once the board decided to terminate plaintiff, the most it could do to prevent injury to his reputation was to maintain silence as to its reasons. See *Shrick v. Thomas*, 486 F.2d 691, 693 (7th Cir. 1973). *The board is not responsible for plaintiff's decision that it would be better for his reputation to publish the reasons.* (523 F.2d at 573; Emphasis supplied)

In the case at bar, while it was the decided preference of both Wallen and Hines to maintain silence about the reasons for the plaintiff's discharge, as evidenced by their initial letters of dismissal, the reasons for their actions were disgorged by the plaintiff herself, and these defendants were obliged to respond by the mandate of law.

It is not, therefore, simply the act of disclosure that suffices to put in motion a discharged employee's due process rights, regardless of how stigmatizing the disclosure may be. The thrust of the recent court decisions focuses on (1) whether the disclosure was made public, and (2) whether the employer had the prerogative of avoiding the disclosure. If, in the first instance, there is no public disclosure, then the employee's standing in the community and his potential for future employment are not deemed affected. If, in the second instance, the employer was compelled to disclose by the employee or otherwise had no choice in the matter, the employer should similarly not be held to account.

These principles, presaged in cases such as *Paul, Velger, Weathers and Hostrop* (see also *Karprelian v. Texas Woman's University*, 509 F.2d 133, 139 (5th Cir. 1975);

Sims v. Fox, 505 F.2d 857, 863 (5th Cir. 1974); *Ortwein v. Mackey*, 511 F.2d 696 (5th Cir. 1975); *Huntley v. Community School Board of Brooklyn*, 543 F.2d 975 (2d Cir., 1976)), have been reinforced by the Supreme Court's decision last term in *Bishop v. Wood*, *supra*, 96 S. Ct. 2074, wherein, in holding that a police officer's dismissal for "failure to follow certain orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer" did not entitle the policeman to a liberty interest due process hearing, the Court adopted the following rationale (96 S. Ct. at 2079-2080):

In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honesty, or integrity" was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after the petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. A contrary evaluation of either explanation would penalize forthright and truthful communication between employer and employee in the former instance, and between litigants in the latter.

Applying *Bishop* to the present case compels the conclusion that the plaintiff is not entitled to a due process hearing, even if it be assumed that she has been stigmatized, which is by no means conceded, since: (1) The initial communication which was the genesis of the alleged stigma occurred in the privacy of Wallen's office; (2) Likewise, the conversation which the plaintiff had with Hines was conducted in the privacy of his office; (3) Each of these

defendants, in notifying the plaintiff of their recommendations against tenure, maintained absolute silence as to the reasons for their determinations; (4) These defendants were obliged to divulge their reasons only as a consequence of the plaintiff's demands; (5) The subject legal proceeding, as well as the litigation commenced by the Teachers Association in the plaintiff's behalf and the 3020-a hearing on the removal proceedings against Johnson, were not initiated by the defendants and, in any event, "did not commence until after the [plaintiff] had suffered the injury for which [she] seeks redress;" (6) The reasons for the plaintiff's discharge have not otherwise been disclosed by any of the defendants to the public or to any prospective employers, and the policy of the School District is not to make such disclosures.

In this last regard, the plaintiff would have the Court believe that she was discharged because "she colluded or conspired with the principal of her school to falsify his observations and evaluations of her," that the defendants disseminated these contentions "to the news media," and that "[t]he complaint, and supporting affidavits and exhibits establish that defendants publicized their alleged reason for terminating plaintiff." (Appellant's Brief, pp. 3, 13.)

These are simply bald assertions, and are not supported by the record.

As for the issue of dissemination, while the complaint contains a single bare allegation that "[d]efendants caused publication of the within controversy in local papers and in *Newsday*" (59; Complaint ¶ 74, Rule 56(e) FRCP), provides that when a motion for summary judgment is made "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial" if he is to avoid having summary judgment entered against him.

This the plaintiff has failed to do, for the record is void of any specific facts showing that the defendants disseminated any of the plaintiff's circumstances to the press or public.

To the contrary, the affidavits of the defendants (268-280, 414-430) assert that the precise opposite was the case and that, in spite of constant pressures brought upon them by the plaintiff herself and her loyal supporters, strict confidentiality was always maintained, and will continue to be maintained, consistent with the School District's policy (277-278).

In respect to the reason for her discharge, the plaintiff would have the Court's attention focus on her many denials that she conspired with her principal to fabricate her observations and evaluations. However, the School District has never maintained that the plaintiff was discharged for such reason.

Apparently the plaintiff wishes to impose a stigma upon herself in order to create a "liberty interest" claim.

The record, however, discloses the precise bases for the reasons why she was not recommended for tenure.

Thus, in his letter to the plaintiff of June 11, 1975, in compliance with his responsibilities under § 3031 of the Education Law, Hines advised the plaintiff that "the primary reason for not recommending you to tenure is *your admitted signing of teacher evaluation reports long after the alleged evaluations had taken place.*" (75; Emphasis supplied.)

Notwithstanding the plaintiff's insistence that the observations and evaluations had in fact taken place and that the dates were therefore of no consequence, Hines further stated (75-76):

Despite the rationale or explanation of the discrepancies, *the fact remains that you did knowingly*

sign evaluation reports after a considerable time lapse from the date of the supposed observations. Also, you signed without checking the accuracy of the dates. Formal teacher evaluation reports are vital documents, quasi-legal in nature, which cannot be taken lightly. You should have either refused to sign them because of the time lapse, or, at the very least, verified that the observations did take place on the date indicated. (Emphasis supplied)

The record before the Court is replete with admissions by the plaintiff that the facts underlying Hines' negative tenure recommendation are true. Thus, the plaintiff admits signing all of the evaluation reports (15, 50); admits in her complaint that "at least one" of the false dates did not appear to be in her handwriting, but fails to deny therein, or anyplace else, that the remaining four wrong dates were also not in her handwriting (49); and admits that, as Hines asserts, she signed the reports in question long after the observations took place and without checking the accuracy of the dates. (5-18, 93)

Thus, while the plaintiff may or may not have been an innocent victim of Johnson's circumstances, or may question the adequacy of the reasons for Hines' determination, the specific reasons for the District Superintendent's negative tenure recommendation was, nonetheless, based upon admittedly true information.

Plaintiff would have the Court believe that she lost her employment because of the charges preferred against Johnson and the hearings that ensued thereafter on June 12, June 23 and July 9. In truth, the plaintiff lost her employment on June 2, 1975 for reasons communicated to her on June 11, 1975, when the District Superintendent decided not to recommend her for tenure (313, 75). The Board of Education could not, under New York law, thereafter override the District Superintendent's decision, its power being limited solely to recommending for recon-

sideration. *Anderson v. Board of Education of City of Yonkers*, 38 N.Y.2d 897 (1976).

Obviously aware of the Supreme Court's recent decision in *Codd v. Velger*, *supra*, 97 S.Ct. 882, reversing *sub nom. Velger v. Cawley*, *supra*, 525 F.2d 334, the appellant prefers to obfuscate the specific reasons for the loss of the plaintiff's employment, since not only must a claimed stigma "result from the decision to discharge" (*Velger v. Cawley*, *supra*, 525 F.2d at 336) but, as a consequence of the Supreme Court's reversal in *Velger*, any such stigma must now also be *false*. As the Court stated (97 S.Ct. at 884):

Since the District Court found that respondent had no Fourteenth Amendment property interest in continued employment, the adequacy or even the existence of reasons for failing to rehire him presents no federal constitutional question. *Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required.* (Emphasis supplied)

It may well be that the plaintiff herself has possibly created and disseminated a false impression in connection with her termination. What is certain, however, and controlling, is that the defendants have not falsely stigmatized the plaintiff in connection with the termination of her employment.

Thus, applying *Roth*, *Paul*, *Bishop* and *Codd* to the uncontroverted and established facts of the present case, the plaintiff does not have an actionable liberty interest claim.⁷

⁷ Plaintiff's reliance upon the School District's mistaken communication to the Unemployment Division is of no legal significance since it transpired well after the termination of her employment, was not a public disclosure or made to one contemplating the employment of the plaintiff and, in any event, did not result in any loss of benefits. See again *Paul v. Davis*, *supra*.

POINT II

Assuming Arguendo That Plaintiff's Liberty Interests Had Been Violated, Due Process Standards Have, Under The Circumstances, And By Virtue Of The Fair Dismissal Law, Been Satisfied.

The assumption underlying the plaintiff's entire liberty interest claim is that she has not been afforded a "due process hearing." While not conceding that the plaintiff is entitled to such a hearing, the defendants take issue with the supposition that she has not already been afforded all the process to which she is due.

As yet the Supreme Court has not considered what form of hearing is appropriate to protect a person's interest in liberty. However, in *Codd*, the majority of the Court made it perfectly clear that the remedy mandated by the due process clause is solely an opportunity to refute the charge, the purpose of the hearing not being to provide the person with an opportunity to have his job (property) restored, but rather to furnish him with an opportunity to clear his name. (97 S.Ct. at 883-884)

Since "due process is flexible and calls for such procedural protections as the particular situation demands" (*Morrissey v. Brewer*, 408 U.S. 471, 481 [1972]), the type of hearing required to clear someone's name may be entirely of a different bent than if the issue was the restoration of employment as a result of a claimed deprivation of a property interest.

Curiously enough, even Justice Stevens, who, in dissenting in *Codd*, would opt for a stigma hearing to also review the propriety of the discharge, notwithstanding the truth of the charge (97 S.Ct. at 887), acknowledged that even if property interests were the basis of the claimed deprivation, *Morrissey* might allow, in satisfaction of such due

process rights, for notice of the charge and an opportunity to respond "if only in writing." (97 S.Ct. at 891, n. 15)

Justice Stevens' perceptions are in keeping with the Court's recent expression in *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances." See also, *Dixon v. Lane*, — U.S. —, 45 L.W. 4447, 4450 (decided May 16, 1977).

It may well be, therefore, that the Fair Dismissal Law (Education Law § 3031), adopted in 1972 for the specific purpose of affording probationary teachers with notice from the accusing party, a written statement of reasons, and the opportunity to respond in writing prior to final action, satisfies the rudiments of due process in respect to both property and/or liberty interest claims.

It would certainly seem that with respect to affording a person an opportunity to clear his name, § 3031 of the Education Law allows all probationers, at their discretion, "a meaningful opportunity to present their case." *Mathews v. Eldridge*, *supra*, 424 U.S. at 349.

Moreover, under the facts of the present case, the plaintiff was given a full opportunity to appear before both Wallen and Hines, to present evidence in her behalf, to be represented by her union representatives, and to appear before and be heard by the Board of Education before it approved of the District Superintendent's recommendation.

Thus, from both a pragmatic standard, as well as by reason of the full implementation of the process provided under the Fair Dismissal Law, the plaintiff has had a meaningful opportunity to clear her name. It would appear from the huge public support she engendered from the community, and from the petition submitted to the Board in her behalf, containing more than 700 names, that she was highly successful.

In fact, the plaintiff admits that she enjoys an excellent reputation in her community, notwithstanding her discharge. Thus, as she stated in her written response to the District Superintendent, on June 26, 1975 (94-95):

Further, you fail to recognize or ascertain the actual position of very significant numbers of community residents in their feelings of aggrievement of the treatment tendered me in this issue. Their expressed desire is for my continuance as a teacher in their School District. Intrinsicly (sic), this community based support is *crucial* in predicting my future effectiveness as a teacher in the stated district. It negates any concern, that there exists any real possibility that there would be "impairment" of my effectiveness as stated.

Overwhelming public support of me clearly indicates public knowledge of me as a proven, effective, classroom teacher of many years service to their district, of my personal and professional integrity and of the public's desire that I will continue my service to their children in the schools of their community even more effectively in the future.

It is at once apparent that plaintiff is ~~not at all~~ concerned about her good name or her reputation in the community, but is really desirous of having a hearing to review the basis for the loss of her job in order to obtain reinstatement to her teaching position.

Plaintiff is not entitled to such a hearing or to reinstatement, by reason of a claimed deprivation of a liberty interest (*Codd v. Velger, supra*, 97 S.Ct. at 883-884; *Weathers v. West Yuma County School District*, 530 F.2d 1335 [10th Cir. 1976]), as might otherwise be the case if she was improperly deprived of a property interest in her employment.

POINT III

The Plaintiff Was Not Deprived Of A Property Interest In Her Employment.

The plaintiff's claim to a "due process hearing" by reason of the alleged deprivation of her "property" rights clearly depends on whether she was a tenured teacher at the time of her discharge (*Lombard v. Board of Education*, 502 F.2d 631, 637 (2d Cir. 1974); *Canty v. Board of Education*, 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907; *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972)), which issue must be decided by reference to state law (*Bishop v. Wood*, *supra*, 96 S.Ct. 2074, 2077-2078), "since property interests are not created by the Constitution." *Board of Regents v. Roth*, *supra*, 408 U.S. at 577.

Having resigned in 1967, after initially achieving tenure in 1965, the plaintiff was properly rehired in 1968 as a probationer, having no entitlement to re-employment as a tenured teacher. *Matter of Schultz*, 11 Ed.Dept.Rep. 224 (1972). At no time thereafter did the plaintiff work for the requisite three consecutive years, as required under Education Law § 3013, nor was she deprived in 1970 of a leave of absence to which she was constitutionally, statutorily or contractually entitled, let alone a two year leave of absence to 1972 when she returned to the School District. The plaintiff was properly again re-employed in 1972, therefore, as a probationary teacher.

It is of no aid to the plaintiff to claim that she had at some point in time reacquired tenure by estoppel (Count IV), since such tenure can only occur "where the teacher actually renders teaching services after the expiration of the probationary period." *Matter of Grebel*, 14 Ed.Dept. Rep. 305, 307 (1975); *Mugavin v. Nyquist*, 48 A.D.2d 727 (3d Dept. 1975).

Nor can the plaintiff sustain her theory of "tenure by contractual default" (Count V) in reliance upon an alleged violation of Article IV(B) of the collective bargaining agreement. This argument is foreclosed by reason of the prior state adjudication of the exact same issue between the parties (the plaintiff, as grievant, acting through her Teachers Association), which determined that Article IV(B), including its notice and "tenure by default" provisions, are void. *Brookhaven-Comsewogue School District v. Port Jefferson Station Teachers Association*, — A.D.2d —, 389 N.Y.S.2d 402 (2d Dept. 1976), motion lv. to appeal pending — A.D.2d —.

While *res judicata* and collateral estoppel cannot defeat a claim under §1983 regarding issues of procedural due process, they serve as bars in regard to issues involving the application of state law. *Lombard v. Board of Education, supra*, 502 F.2d at 636; *Frazier v. East Baton Rouge School Board*, 363 F.2d 861 (5th Cir. 1966).

In any event, the law of the State of New York is correctly stated in the New York State Supreme Court and Appellate Division decisions. While the plaintiff claims that the issue has yet to be finally resolved since there is pending before the Appellate Division an application for leave to appeal to the New York State Court of Appeals, and therefore "[a]ppellant then arguably has some property interest in her position, albeit a limited one" (Appellant's Brief, p. 39), property rights are not created by the filing of litigation papers. At best the issue is ripe for the classic application of the abstention doctrine. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

As for Count VI, where the plaintiff requests that she be "entitled to teach an additional year as a probationer" (63-64; Complaint ¶¶ 107-109), since there is no breach of any valid and binding clause of the collective bargaining

agreement the plaintiff is not entitled to reinstatement for an additional probationary year. *Cf. Board of Education, Bellmore-Merrick Central High School District v. Bellmore-Merrick United Secondary Teachers, Inc.*, 39 N.Y.2d 167 (1976); *Legislative Conference v. Board of Higher Education*, 38 A.D.2d 478 (1st Dept. 1972), *aff'd* 31 N.Y.2d 926 (1972); *Board of Education of Chautauqua Central School District v. Chautauqua Central School Teachers Association*, 41 A.D.2d 47 (4th Dept. 1973).

Thus, since the plaintiff was not, as a matter of state law, deprived of any property interest, she was not thereby entitled to a "due process hearing" before her teaching services were terminated.

POINT IV

The Court is Without Subject Matter Jurisdiction To Entertain Any Claims For Damages Against The Board of Education Or Any Of The Individual Defendants In Their Official Capacities.

Starting from the premise that a municipality is not a "person" under the Civil Rights Act (*Monroe v. Pape*, 365 U.S. 167, 187-192 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507 (1973)), the Second Circuit in its recent decision in *Monell v. Department of Social Services*, 532 F.2d 259 (2d Cir. 1976), after tracing the evolution of the concept of "person" under § 1983, concluded that a "Board of Education *itself* is not a 'person' within the meaning of § 1983 and that this court, accordingly, has no jurisdiction to award any relief against it under the Civil Rights Act". (532 F.2d at 264)

The Court further addressed itself to the question of whether "officials named in [the] complaint may be sued in their official capacities under § 1983 for damages" (532

F.2d at 264), holding that: (532 F.2d at 266)

The mere substitution of the name of the official for the name of the city in the complaint cannot be used as a subterfuge to circumvent the intent of Congress. Thus, we must consider the suit at hand to have been brought directly against the City and the Board of Education, which, as we have seen, are not "persons" for purposes of §1983. We are therefore without jurisdiction to hear this suit.

To the extent, therefore, that the defendants are being sued in their official capacities for monetary damages under the Civil Rights Act and its jurisdictional statute, 28 U.S.C. §§ 1343(3) and (4), the Court is without jurisdiction to entertain any damage claims against them, as well as against the Board of Education.⁸

It would appear logical to apply a similiar proscription in respect to monetary damages claimed under the Fourteenth Amendment through 28 U.S.C. § 1331(a), although this precise issue was not before the Court in *Monell*.⁹

However, the rationale of *Monell*, being bottomed on the bar of the Eleventh Amendment, designed to protect the public treasury (see *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)), should apply with equal force regardless of which predicate theory is utilized in seeking money damages from public funds. As the Court stated, drawing upon the landmark case of *Ex parte Young*, 209 U.S. 123 (1908):

An action for money damages, as distinct from a suit for injunctive relief, can hardly be said "not [to]

⁸ Other than possibly for back pay in the event of reinstatement, since such pay would be purely an adjunct of such equitable relief, hardly the case in respect to the plaintiff's \$2,000,000 claim for compensatory and punitive damages. See *Monell, supra*, 532 F.2d at 267.

⁹ As the Court noted: "Since there is no claim alleged under 28 U.S.C. § 1331 . . . we do not consider whether such a claim would lie." (532 F.2d at 260, n. 1)

affect the State in its sovereign or governmental capacity," 209 U.S. at 159, if the state is required to pay the judgment. And, in such case, the bar of the Eleventh Amendment applies even though the named defendant is the official rather than the state. (532 F.2d at 265)

To be sure, any monetary judgment against the individual defendants in their official capacities would be tantamount to a judgment against the School District, to be satisfied from public funds (see Education Law § 3811), and hence the principles of *Monell* and the Eleventh Amendment must preclude any judgment which must be satisfied from the public fisc. (See also *Skehan v. Board of Trustees*, 501 F.2d 31, 41-45 (3d Cir. 1974); *Harkless v. Sweeney*, 388 F.Supp. 738, 747 (S.D. Tex. 1975).)

Nonetheless, a number of Circuits, relying upon what they believe to be the holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), have stated that a monetary claim can lie against the state and its officials if jurisdiction is predicated upon the Fourteenth Amendment under 28 U.S.C. § 1331. Typical is the Sixth Circuit's language in *Amen v. City of Dearborn*, 532 F.2d 554, 559 (6th Cir. 1976), where acting in total reliance on *Kenosha*, the Court stated that "[t]hough municipalities . . . cannot be sued through section 1983, it is well established that municipalities . . . may be sued directly for fourteenth amendment violations through the general federal question jurisdictional statute, 28 U.S.C. § 1331."¹⁰

However, reliance on *Kenosha* is clearly misplaced since the Supreme Court there remanded this precise issue to

¹⁰ See to the same effect, *Reeves v. City of Jackson, Mississippi*, 532 F.2d 491, 495 (5th Cir. 1976); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 577 (7th Cir. 1975).

the District Court, stating "[w]e have had the benefit of neither briefs, arguments, nor explicit consideration by the District Court of the jurisdictional questions presented by the intervention of the Attorney General as a party, and the availability of § 1331 jurisdiction. . . ." (412 U.S. at 514)

And in *Bivens*, the Court only held that, in the absence of an "explicit congressional declaration" (403 U.S. at 397), the fashioning of damage remedies by the court for violations of constitutional rights, while not mandated by the Constitution, may be permitted in appropriate circumstances.

Thus, Judge Platt, also of the Eastern District of New York, in his recent application of *Monell* in *Turano v. Board of Education of Island Trees Union Free School District* (E.D.N.Y. 1976, #75 C 606, Supplemental Opinion —annexed to Appellant's Brief), held that *Monell* means that because of the unavailability of damages under § 1983, as reinforced by the Eleventh Amendment, *Bivens* "should not be construed to allow suits for damages to be brought directly under the Fourteenth Amendment," and concluded that:

The end result is that no jurisdictional basis for a claim against defendant Board of Education or its employees in their official capacities appears to exist under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, and that the existence of such a basis under the Fourteenth Amendment and 28 U.S.C. § 1331 is to say the least very doubtful.

Judge Platt's intelligent analysis of *Kenosha* and *Bivens* was recently confirmed by the Supreme Court this term in *Mt. Healthy City School District Board of Education v. Doyle*, — U.S. —, 97 S.Ct. 568 (January 11, 1977), wherein the Court acknowledged that it has yet to decide whether or not one who seeks a recovery for an alleged violation of a constitutional right under color of state law

is bound by the limitations contained in 42 U.S.C. §§ 1981, et seq., notwithstanding that the action also is brought under 28 U.S.C. § 1331 or under any other jurisdictional statute. (97 S.Ct. at 571)

The Court, however, passed this issue for another day since it was not satisfied that it had a proper record before it to warrant its resolution, acknowledging that "it is an extremely important question." (97 S.Ct. at 571)¹¹

While Judge Platt also preferred to defer the ultimate resolution of this issue, the present case is meet for putting a quietus to whatever residual doubts may still prevail as to whether a damage claim against a Board of Education and its members and agents, acting in their official capacities, can be jurisdictionally sustained on the assertion of Fourteenth Amendment violations when no such claim can be sustained under §§ 1981 et seq. of the Civil Rights Act.

As *Monell* intimates, and as *Turano* acknowledges, no plausible reason exists to permit a damage claim against municipalities and their officials under § 1331 while barring it under § 1983.

POINT V

The Complaint Does Not State A Claim For Damages Against The Individual Defendants In Their Individual Capacities Or, In The Alternative, Cannot Withstand The Defendants' Motion For Summary Judgment.

While the Court is without jurisdiction to entertain damage claims against the defendants in their official capacities, it does have jurisdiction to entertain damage claims

¹¹ The Court also noted that "[t]he related question of whether a school district is a person for purposes of § 1983 is likewise not before us," also leaving this question for another day. (97 S.Ct. at 572) Of course, this Circuit, in *Monell*, has now decided this question in the negative.

against them in their individual capacities since "individual officials who violate the civil rights of plaintiffs may be required to respond to damages for their tortious conduct out of their own pockets." *Monell v. Department of Social Services, supra*, 532 F.2d at 264; *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974).

Plaintiff seeks such judgment against the defendants, out of their own pockets, in the sum of two million dollars, claiming that they "knew or should have known that by their actions . . . they were violating plaintiff's constitutional rights" (Count VII), and that they did so "deliberately, knowingly, maliciously and/or with gross negligence" (Count VIII).

In addition, asking the Court to exercise pendent jurisdiction, the plaintiff seeks damages for state causes of action, alleging that the defendants "have tortiously defamed plaintiff" (Count IX), "have interfered with plaintiff's right of contract and professional reputation" (Count X), and have "intentionally inflicted mental distress upon plaintiff" (Count XI).

Turning first to the plaintiff's federal tort claims premised on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908),¹² the plaintiff would presumably cast personal liability upon even those Board members who have not served since 1970, because they allegedly failed to act on the plaintiff's request for a leave of absence in order to adopt a baby.

While sensitive to her own personal circumstances, the plaintiff has no qualms about seeking millions of dollars

¹² *Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." (209 U.S. at 159-160)

personally from these defendants for this alleged malicious and deliberate act.

Nothing better points up the wisdom in the establishment of the qualified immunity which the courts have fashioned to protect public officials against federal tort claims. Its rationale is perhaps best expressed in *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974), as follows:

It is important to note . . . that one policy consideration seems to pervade the analysis. The public interest requires decisions and action to enforce the laws for the protection of the public. Mr. Justice Jackson expressed this general proposition succinctly, stating "it is not a tort for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57, 97 L.Ed. 1427, 73 S.Ct. 956 (1953) (dissenting opinion). Public officials . . . who fail to make decisions when they are needed or who do not act to implement decisions when they are made, do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err.

The Supreme Court has recently dealt with the question of immunity as applied to school administrators in *Wood v. Strickland*, 420 U.S. 308 (1975), holding that "there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." (420 U.S. at 321)

While *Wood* involved the question of student discipline by school administrators, its rationale has been extended to immunize administrators and school board members in cases involving the discharge of teachers. *Shirley v. Chagrin*

Falls Exempted Village Schools Board of Education, 521 F.2d 1329 (6th Cir. 1975); *Hutchinson v. Lake Oswego School District No. 7*, 519 F.2d 961 (9th Cir. 1975); *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975); *Mims v. Board of Education of the City of Chicago*, 523 F.2d 711 (7th Cir. 1975).

As the Court stated in *Hostrop*, *supra*, although *Wood v. Strickland* "... dealt with board members' individual responsibilities for disciplinary proceedings against students, its discussion of immunity is equally applicable to conduct of board members affecting the rights of teachers. . . ." (523 F.2d at 577)

Under the standards enunciated in *Scheuer* and *Wood*, the defendants are, therefore, immune from personal liability for all of their official acts performed in good faith and upon a reasonable belief that the acts performed were constitutional.

How then do the factual allegations of the complaint and the undisputed facts to be culled from the various affidavits and documentary evidence submitted by the parties in support of their respective motions fare against this immunity standard?

The complaint is devoid of any material factual allegations showing, or even tending to show, that any of the defendants acted in bad faith in the performance of their duties. To the contrary, the record before the Court plainly shows that each defendant discharged his or her responsibilities in good faith.

The complaint is further lacking in any allegation that the defendants discharged their official duties with a reasonable belief that they were performing unconstitutional acts against the defendant. To the contrary, the record is plain that they were performing acts mandated by state laws designed to secure, rather than to suppress, the plaintiff's rights.

The 1970 Members of the Board of Education

As to the 1970 Board members, it is difficult to envisage that the plaintiff seriously believes that they are personally liable to her in damages. There is no law known that imposes a duty on a Board of Education to grant leaves of absence in order to accommodate a teacher's desire to adopt a baby. In fact, it was not until 1974 that the Supreme Court, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), even considered the issue of maternity policies, and then only in the context of addressing itself to the constitutionality of mandated maternity leaves. Just what the posture of the Supreme Court would be regarding the denial of adoption leaves, is presently unknown. However, it is certainly far from clear that the Supreme Court would automatically equate maternity with adoption, under some sort of equal protection argument, since, as shown in *LaFleur*, it is not the act of pregnancy which gives rise to constitutional claims, but rather the disemployment of physically healthy teachers who happen to also be pregnant, a factor which is not at all related to a teacher's desire to adopt a child.

In any event, the plaintiff must point to a constitutional deprivation as the law existed in 1970, at the time of the alleged deprivation. This she has not done and, it is submitted, she cannot do. Cf. *Shirley v. Chagrin Falls Exempted Village Schools Board of Education*, 521 F.2d 1329 (6th Cir. 1975); *Hutchison v. Lake Oswego School District No. 7*, 519 F.2d 961 (9th Cir. 1975); *Sullivan v. Mead Independent School District No. 101*, 530 F.2d 799 (8th Cir. 1976).

Of course, serious consideration must also be given to the fact that the plaintiff complains of the Board's failure to grant her request for this leave of absence six years after the event. If she believed herself aggrieved at that time she had at her disposal a host of state remedies.

Since Congress has failed to prescribe a statute of limitations, state law governs the question of whether an action has been timely commenced. *Ammlung v. City of Chester*, 494 F.2d 811 (3rd Cir. 1974); *Conrad v. Stetzel*, 225 F.Supp. 244, 248 (E.D. Pa. 1963). Under any possible equivalent state theory, the statute of limitations for a suit seeking monetary damages has long since expired.¹³ So, too, the entire battery of legal and equitable defenses, waiver, estoppel, laches, must be aimed at plaintiff's claim at this late date.

The 1975 Members of the Board of Education

The 1975 defendants participated in two events which concerned the plaintiff. In mid-April, they met in executive sessions to consider the charges which the District Principal preferred against Johnson, and voted to institute proceedings for his removal or discipline under § 3020-a of the State's Education Law. On July 21st, they attended a School District meeting (except for the defendant Sapienza, who was absent on that occasion) and, after having considered the plaintiff's response to Hines' reasons for not recommending tenure, as required of them under § 3031 of the Education Law (*Anderson v. Board of Education of City of Yonkers*, 38 N.Y.2d 897 (1976)), voted upon his recommendation, as was their duty under § 3013 of the Education Law. Thus, the defendants were not only acting under color of state law, they were acting under direction of state law. To have failed to act in respect to their mandated statutory duties would have properly subjected the defendants to the charge of dereliction of their duties and sworn oath to uphold the laws of the State.

¹³ So, too, to the extent that the complaint can be read as suggesting that the Board's actions in 1970 warrant the plaintiff's reinstatement six years hence, such equitable relief, due to this long passage of time, should no longer be available to her. See *Mims v. Board of Education of the City of Chicago*, 523 F.2d 711, 715 (7th Cir. 1975).

Since the State's legislative enactments carry with them the heavy presumption of constitutionality (*Lincoln Building Associates v. Barr*, 1 N.Y.2d 413 (1956); *National Psychology Assoc. for Psychoanalysis, Inc. v. State of New York*, 8 N.Y. 2d 197 (1960)), it is frivolous to suggest that the defendants' acts constituted bad faith and were tantamount to a belief that they were violating the plaintiff's constitutional rights. To hold otherwise would be tantamount to holding that it is a "tort for government to govern." *Dalehite v. United States*, 346 U.S. 15, 57 (1953).

Indeed, the defendants acted pursuant to state statutes specifically designed to further, rather than to lessen, the rights of affected parties. Thus, under § 3020-a, they implemented the rudimentary due process rights to which Johnson was entitled as a tenured employee, and under §§ 3013 and 3031 they properly acted as an official body to evaluate and review the negative tenure recommendation of the District Superintendent.

The District Principal and District Superintendent

So, too, the District Principal and District Superintendent acted in accordance with their mandated responsibilities. Wallen was required under Article IV(B) of the District's collective bargaining agreement to give the plaintiff notice of non-renewal of her employment ninety (90) days prior to June 30th, and Hines was required under § 3013 to give the plaintiff written notice of his recommendation to the Board of Education not to appoint her for tenure.¹⁴

¹⁴ This was the requirement at the time. Presently, as a result of recent legislative enactment, the District Superintendent is now relieved of this responsibility, the burden being shifted exclusively to the District Principal. (Laws of New York 1975, ch. 436).

In each case their initial notice simply advised the plaintiff that she would not be retained. The reasons for these determinations, from which much of the plaintiff's case of constitutional deprivations is devised, was induced by the plaintiff herself by virtue of her demands for the reasons for her discharge. Being faced with her demand, the District Superintendent was duty-bound under the Fair Dismissal Law to give her full and forthright reasons for his recommendation. (§ 3031, Education Law; *Rathbone v. Board of Education of Hamilton Central School District*, 47 A.D.2d 172 (3d Dept. 1975), appeal dismissed 36 N.Y.2d 916 (1975).

Not only did Wallen and Hines not act in bad faith, they acted in the best of faith by affording the plaintiff a full and fair opportunity to appear before them and to be heard. Thus, Wallen met with the plaintiff, in private, on two separate occasions, and while much of what he may have said to the plaintiff during the course of their private conversations may not have pleased her, Wallen afforded her a full opportunity to be heard before he made his determination.

Similarly, Hines met with a contingency of plaintiff's supporters and also met with the plaintiff and her representatives, at which time the plaintiff submitted evidence in her behalf and was fully heard. He clearly extended himself to the plaintiff, and his reasons for his negative tenure recommendation, while understandably not to the plaintiff's liking, were forthright, candid, professional and not at all suggestive of any bad faith or desire to abridge her constitutional rights.

The present case, therefore, appears to be a classic vehicle for the application of the immunity standards enunciated in *Wood v. Strickland* and, accordingly, the damage claims against the defendants in their individual capacities, as well as in their official capacities, should be dismissed.

Even should it be determined that the plaintiff had a property right or liberty interest which thereby entitled her to a "due process hearing," and that she was deprived of an appropriate hearing, personal liability cannot thereby attach for the deprivation of such a *procedural* right since "the procedural guarantees of the Due Process Clause cannot be the source" for general federal tort law under the civil rights statutes. *Paul v. Davis, supra*, 424 U.S. at 701. In such a case the plaintiff's remedy would be limited to considerations of declaratory and injunctive relief. See again, *Monell v. Department of Social Services*, 532 F.2d at 264.¹⁵

It would follow that the non-federal tort claims should similarly be dismissed, or, at the very least, the District Court should be directed to decline to accept pendent jurisdiction, leaving it to the courts of New York State to resolve tort issues purely of state creation. Should the Court decide that the exercise of pendent jurisdiction by the District Court would be appropriate, it would be required to dismiss these claims because of the failure of the plaintiff to plead compliance with the notice of claim requirements of § 3813 of the Education Law. *Union Free School District v. New York State*, 35 N.Y.2d 371 (1974). In addition, no tort claims can now be maintained against the 1970 defendants by virtue of the New York State three-year statute of limitations. New York Civil Practice Law and Rules §§ 214, 215.

¹⁵ Curiously, while this Circuit has held that injunctive and declaratory relief are available under § 1983 against municipal and state officials sued in their official capacities (*Monell, supra*, and cases cited at 532 F.2d 264), the Supreme Court in *Kenosha* has held that the municipality itself is not a "person" for any purpose under § 1983, and hence not even equitable relief can be fashioned against it. (412 U.S. 507 at 513). Yet, the effectiveness of equitable relief is best achieved against the municipality itself, especially since, as in the present case, there may be few of the defendants who still serve as Board members. Nor is it entirely clear from the face of § 1331(a) that equitable relief can be effected thereunder against any of the defendants.

CONCLUSION

The Order Of The District Court Should Be Affirmed.¹⁶

Smithtown, New York
May 31, 1977

Respectfully submitted,

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Of Counsel

¹⁶ While Appellant requests the Court to issue preliminary mandatory injunctive relief restoring plaintiff to her teaching position if, perchance, the Court were to reverse, it would appear that such relief clearly is not indicated. In any event it would be best to leave this matter for the District Court where a proper hearing can be held as to its efficacy.

(61557)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GLADYS GENTILE,

Plaintiff-Appellant,

against

JOHN WALLEN, et al.,

Defendants-Appellees.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 1st
day of June, 1977, he served two copies of the
Appellees' Brief on

James R. Sandner, Esq.

the attorney for the Appellant
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. 260 Park Avenue South, New York () N. Y.,
that being the address designated by him for that purpose upon
the preceding papers in this action.

Irving Lightman

Sworn to before me this

1st day of June, 1977.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

BEST COPY AVAILABLE

